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IN THE

Supreme Court of the United States

UNITED STATES AND CALIFORNIA *EX REL.*
O'CONNELL AND MOYERS,

Petitioners,

v.

CHAPMAN UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR FEDERAL JURISDICTION PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae listed in the Appendix are law professors who teach and write in the field of federal jurisdiction. Although *amici* hold a range of views on the proper scope of federal jurisdiction, *amici* all have a common interest in the clarification of the scope of federal jurisdiction and of judicial authority to regulate it. On that basis, *amici* respectfully submit this brief in support of the petition.[1]

SUMMARY OF ARGUMENT

Bowles v. Russell held that the deadline to file a notice of appeal in a civil case under 28 U.S.C. § 2107 is jurisdictional. 551 U.S. 205 (2007). Another line of cases has held that this Court has a "supervisory appellate power"—even though its appellate jurisdiction is lacking—to vacate a lower court decision for a "fresh decree" to restart the clock for filing a notice of appeal. *E.g.*, *Walling v. Reuter*, 321 U.S. 671, 676-77 (1944); *Phillips v. United States*, 312 U.S. 246, 254 (1941). Petitioner seeks certiorari on whether the U.S. Courts of Appeals have a similar power in the face of an untimely appeal under § 2107.

This Court should hear and resolve Petitioner's important question of federal jurisdiction. *Amici* recognize that Petitioner's proposal, at first blush, may seem easily dismissed as contravening the conven-

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. The parties have consented to the filing of this brief and their letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their academic institutions made a monetary contribution to its preparation or submission.

tional view of jurisdiction as "inflexible" and "without exception." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). *Amici* aim to assuage these concerns by putting Petitioner's proposal in a broader context. In that context, jurisdiction often is regulated by non-jurisdictional procedural rules that themselves are subject to court or party discretion. Petitioner's proposal fits within this broader context.

This Court should therefore grant the petition to clarify the scope of procedural regulation of appellate jurisdiction and to determine whether Petitioner's proposal is a permissible mechanism for doing so.

ARGUMENT

I. JURISDICTIONALITY AND NONJURISDICTIONALITY ARE NOT MUTUALLY EXCLUSIVE.

The conventional view is that jurisdiction is different in kind than other requirements of substance and procedure and occupies mutually exclusive doctrinal space. Jurisdiction is the "power" of the Court. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). As such, and generally unlike matters of procedure or substance, jurisdiction normally is seen as having a number of special features: It must be satisfied at the outset; it cannot be consented to; jurisdictional defects cannot be waived, forfeited, or excused for equitable reasons, and may be raised by any party any time before final judgment; the court has an obligation to assure itself of its own jurisdiction at all times; and judgments entered without jurisdiction are void. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). These features usually are seen as reserved for jurisdictional issues.

In reality, however, nonjurisdictional questions can have these jurisdictional features too. *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 6 (2008). And they often do. *See, e.g.*, *Day v. McDonough*, 547 U.S. 198, 206-07 (2006) (a habeas petitioner's procedural default may be raised sua sponte); *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (Federal Rule of Criminal Procedure 45(b) is "inflexible"); 28 U.S.C. § 2254(b)(3) (a federal habeas petitioner's exhaustion requirement cannot be forfeited by the State); *cf. Kontrick v. Ryan*, 540 U.S. 443, 457 n.12 (2004) (certain bankruptcy rules may not be circumvented by consent of the parties).

II. NONJURISDICTIONAL RULES CAN REGULATE JURISDICTION IN MANY WAYS.

The flip side is true as well: Courts and parties can regulate jurisdiction using nonjurisdictional rules or features that are tied to the jurisdictional doctrine. As the following examples illustrate, this connection between jurisdictionality and nonjurisdictionality exists in a variety of contexts.

A. Incorporation

A rule could be jurisdictional yet also, as a definitional matter, incorporate nonjurisdictional features. These features simply create inlets in the jurisdictional boundary. *See* Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 65 (1994). Section 2107 is, in fact, a good example, for it allows a district court to extend the jurisdictional deadline to file a civil appeal for "excusable neglect or good cause" and to "reopen" it for other reasons. 28 U.S.C. § 2107(c). In these circumstances, the jurisdictional deadline simply shifts in accordance with judicial discretion.

B. Preconditions

A jurisdictional rule could depend upon preconditions that themselves are susceptible to nonjurisdictional treatment. Again, the appellate deadline provides an illustration. The statute requires a "notice of appeal" to be "filed" within the deadline, *id.* § 2107(a), but what "notice of appeal" and "filed" mean are subject to some discretion by the court, *see Smith v. Barry*, 502 U.S. 244, 245 (1992) (treating an appellate brief as a "notice of appeal" for purposes of Rule 3); *Houston v. Lack*, 487 U.S. 266, 268 (1988) (treating a pro se prisoner's notice as "filed" when delivered to prison authorities). In other words, a "filed" "notice" may be a mandatory precondition to appellate jurisdiction, but what satisfies that precondition is subject to judicial discretion.

Another example is the requirement of a "final" decision of a district court for appellate jurisdiction to attach. 28 U.S.C. § 1291(a). What is "final" is subject, under Rule 54(b), to some district-court discretion. A district court can render a nonfinal judgment final and appealable "if the court expressly determines that there is no just reason for delay." FED. R. CIV. P. 54(b). Thus, a district court can create or preclude appellate jurisdiction by exercising discretion over the "finality" precondition.

C. Timing

The traditional conception of jurisdiction is that it must be resolved at the outset—the court cannot proceed to decide other nonjurisdictional matters until it has satisfied itself of jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and lim-

its of the judicial power of the United States and is inflexible and without exception."). But this Court has allowed resequencing of difficult jurisdictional issues in favor of easier procedural issues. *See Sinochem Int'l Co. v. Malay Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (upholding dismissal under the nonjurisdictional doctrine of forum non conveniens without first establishing the existence of subject-matter jurisdiction). Through resequencing, parties can present certain procedural issues for decision even though the court lacks (or is unsure about) subject-matter jurisdiction over the case.

Likewise, the timing of jurisdictional determinations generally is a nonjurisdictional rule within the control of the court and parties. Jurisdiction normally is assessed at the time of invocation. Yet a case that lacks diversity jurisdiction at the time of filing or removal because of a nondiverse defendant can be "cured" of that defect by later dismissal of the nondiverse defendant. *See, e.g., Caterpillar Inc. v. Lewis*, 519 U.S. 61, 64 (1996). The reason is that the time-of-invocation rule is a nonjurisdictional rule that yields to countervailing policy considerations of finality, efficiency, and economy. *Id.* at 75. Nonjurisdictional timing rules thus moderate jurisdiction.

D. Proof Mechanisms

Proof mechanisms allow procedural regulation of federal jurisdiction. Jurisdictional findings are dependent upon party-presented pleadings and evidence. The reason is that "jurisdiction itself is a legal conclusion, a *consequence* of facts rather than a provable 'fact.'" *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 540-41 (7th Cir. 2006) (Easterbrook, J.) (emphasis in original). As such, the parties and

court can control the mechanisms of jurisdictional proof and allegations, thereby affecting the ultimate exercise of federal jurisdiction.

For example, a plaintiff's good faith allegation of damages exceeding the jurisdictional minimum is sufficient to satisfy statutory diversity jurisdiction unless the amount cannot be recovered to a legal certainty. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). The satisfaction of this amount-in-controversy requirement is predominantly left up to the plaintiff's chosen allegations, regardless of whether the requirement is *in fact* satisfied.

If the plaintiff's allegation is challenged by the defendant or the issue is raised by the court, then the plaintiff must prove that the diversity-jurisdiction requirements are satisfied by a preponderance of the evidence. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). At such a jurisdictional hearing, the court presumably will take evidence to resolve questions of jurisdictional fact. *See* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 662 (2005). But the parties will control what evidence is presented, how it is presented, and what evidentiary motions and objections are made. Those decisions and evidentiary rules are nonjurisdictional issues that could influence what factual findings the court can make on the jurisdictional issues themselves.

Thus, for example, some courts have relied on the nonjurisdictional Federal Rules of Evidence to refuse to allow the use of settlement offers to prove the amount in controversy. *E.g.*, *McDevitt v. Guenther*, 522 F. Supp. 2d 1272, 1284-86 (D. Haw. 2008). In determining party's citizenship for purposes of diversity jurisdiction, parties conceivably could control the

presentation of facts supporting a particular citizenship, such as evidence of an individual's domicile, or evidence of the location of a company's "nerve center." Proof mechanisms then enable parties, even within the bounds of their legal obligations, to present allegations and evidence in a way that may lead to a jurisdictional finding contrary to fact.

III. PETITIONER'S PROPOSAL FITS WITHIN THIS TRADITION OF JURISDICTIONAL REGULATION.

Petitioner's proposal is that a Court of Appeals faced with an untimely appeal can vacate the district court judgment and remand for a fresh decree to restart the appellate deadline of § 2107. For a number of reasons, this proposal fits within the tradition of allowing certain procedures to regulate jurisdiction.

First, Petitioner's proposal is similar to other procedural regulations of appellate jurisdiction. The proposal is limited to those contexts in which good cause is shown for missing the original deadline. *Cf.* 28 U.S.C. § 2107(c). Akin to the flexibility in interpretation of statutory terms exhibited in *Smith* and *Houston*, the proposal might be interpreted as a nonmerits vacatur rather than a prohibited "review" of the decree. *Cf. id.* § 2107(a).

Second, Petitioner's proposal is founded upon a species of "jurisdiction to determine jurisdiction," which itself is a recognized doctrine of jurisdictional regulation. *Cf. United States v. United Mine Workers*, 330 U.S. 258, 291-93 (1947) (recognizing the doctrine despite a lack of original jurisdiction). Its use to uphold contempt sanctions, as in *United Mine Workers*, is not fundamentally different than its use in Petitioner's proposal here.

Third, Petitioner's proposal, even if different than the specific illustrations above, is still within the broader scope that they exemplify. Nonjurisdictional facets of procedure can and do regulate jurisdiction, and there is nothing inherently objectionable about it. Petitioner's proposal fits within this tradition of procedural regulation of jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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